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HAROLD B. WILLEY

In the Supreme Court of the United States

October Term 1955

No. 608 Misc.

JOHN P. KAMPMEYER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE A PETITION FOR COMMON-LAW WRIT OF CERTIORARI

AND

PETITION FOR A COMMON-LAW WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court

Petitioner respectfully shows this Honorable Court as follows:

1. On December 19, 1955, an order was entered by the Court of Appeals for the Eighth Circuit, denying his petition for rehearing.

2. More than thirty days have expired from the date of entry of said order, so that review of the judgment of

the Court of Appeals for the Eighth Circuit can only be obtained by a common-law writ of certiorari.

3. Because the United States Government has filed liens against all of his properties, while determination of his tax liabilities is still pending before The Tax Court of The United States, petitioner has been deprived of the means of obtaining the services of a suitable attorney for the prosecution of this action. Not until after said thirty days had expired, and then only through the financial assistance of a friend of his family, was he able to obtain these services. See *U. S. v. Sidney A. Brodson*, ~~132~~ 136 F. Supp. ~~729~~ 158 (U. S. D. C. Wisc. 1955).

4. Because of the grievous errors committed by the courts below, coupled with a most harsh sentence of imprisonment considering his present age of sixty-five, the granting of his petition for a common-law writ of certiorari is necessary in the furtherance of justice.

Wherefore, he moves this Honorable Court for leave to file his petition for a common-law writ of certiorari to the United States Court of Appeals for the Eighth Circuit, as set forth hereinafter.

JACK R. MILLER,

Counsel for Petitioner.

PETITION FOR COMMON-LAW WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, John P. Kampmeyer, respectfully prays that a common-law writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on November 22, 1955. This judgment affirmed his conviction on two counts under § 145(b) of Title 26, United States Code, following which he was fined $7,000 on each count and sentenced to prison for a term of three years on each count, the sentences to run *consecutively.*

OPINIONS BELOW

The opinion of the Court of Appeals affirming the judgment of conviction entered by the District Court is reported at 227 F. 2d 313. A copy thereof is hereunto annexed.

JURISDICTION

The judgment of the Court of Appeals was dated and entered and on November 22, 1955. A petition for rehearing was timely filed on December 7, 1955, and was denied by the Court's order, without opinion, dated and entered on December 19, 1955. Because the thirty-day time limit has expired for filing a petition for a statutory writ of certiorari under § 1254(1) of Title 28, United States Code, the petitioner's only relief is to ask this Court for a common-law writ of certiorari.

Jurisdiction of this Court is invoked under the provisions of § 1651(a) of Title 28, United States Code.

QUESTIONS PRESENTED FOR REVIEW

1. May a defendant be convicted in a "net worth" tax case where the government's net worth exhibit does not reflect a concealed cash reserve at the beginning of the prosecution period merely because the Government's chief witness presumed such reserve to be zero, and notwithstanding independent evidence, including admissions of the government's chief witness, of large amounts of currency owned or controlled by the defendant at that time?

2. Did the court below commit prejudicial error in holding that the main point in controversy was the amount of defendant's net worth on December 31, 1939, when the beginning of the prosecution period was January 1, 1947?

3. Did the court below commit prejudicial error in holding that "the defendant remained quiet at his peril" when, in the course of an investigation of his returns for the years 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, and 1950, he did not volunteer (nor was he asked for) information regarding his concealed cash reserve as of January 1, 1947—the beginning of the prosecution period selected by the government almost three years afterwards?

4. Did the court below commit prejudicial error in affirming the conviction of the defendant and refusing to grant a new trial for prejudicial error committed by the trial court in refusing to instruct the jury that if unreported income showing up during the prosecution years was earned in prior years, the defendant must be acquitted?

THE STATUTE INVOLVED

The statute under which petitioner was prosecuted reads as follows:

Sec. 145(b), 26 U. S. C.:

> "Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

STATEMENT OF THE CASE

Petitioner was indicted, forced to be tried by a jury, and convicted in the United States District Court for the Southern District of Iowa for violating § 145(b) of Title 26, United States Code, for the years 1947 and 1948. He was fined $7,000 on each count and, notwithstanding his age (he was sixty-five on January 6, 1956), sentenced to prison for a term of three years on each count, the sentences to run *consecutively.*

The government attempted to establish its case by the net worth method (R. 118 and p. 315 of opinion below).

The years investigated by the Internal Revenue Service were 1940 through 1950. Every cooperation was given the examining agents by the petitioner (R. 8, 45). Inasmuch as the investigation did not commence until November 8, 1951 (R. 4), the years 1940 through 1944 were open only for possible civil liability. In seeking to establish civil liability, the examining agents, as is customary in civil

net worth cases, sought to determine the petitioner's net worth as of December 31, 1939. The question of how much concealed cash reserve the petitioner had on or about this date naturally arose. The petitioner claimed an amount of about $90,000 (R. 147), which claim was ignored by the examining agents (Ex. 14 at R. 137).

In the course of the numerous conferences and interrogations incident to the investigation, during which the petitioner never refused to try to answer any of the hundreds of questions or sign written statements (R. 45), the special agent in control of the investigation never inquired of the petitioner the amount of his concealed cash reserve at any date other than December 31, 1939. When, almost three years afterwards, the years 1947 and 1948 were selected by the government for prosecution, this cash reserve at the beginning of the prosecution period (January 1, 1947) was presumed to be zero by the special agent (R. 47).

During the trial, substantial evidence was introduced through cross-examination of the government's chief witness that the petitioner possessed or controlled large amounts of concealed cash on or about the beginning of the prosecution period.

In its charge to the jury, the trial court disregarded petitioner's requested Instruction No. 7 (R. 127), which set forth a basic principle of "net worth" tax cases, and appropriate exception was taken. This instruction was especially designed to offset the court's prejudicial and misleading Instruction No. 13 (R. 119), appropriately objected to (R. 97), wherein the court directed the jury's attention to the beginning point for *civil* liability (Janu-

ary 1, 1940) rather than the beginning point for the prosecution period (January 1, 1947). In his motion to set aside the verdict of the jury, the petitioner called the trial court's attention to this error, as follows (R. 130-1):

> "18. * * * The failure to give this instruction resulted in the jury's attention being drawn to the correctness of a beginning point of December 31, 1939 instead of December 31, 1946, which was the true beginning point for the prosecution years."

REASONS FOR GRANTING THE WRIT

As to Question 1

The decision of the court below in refusing to acquit the petitioner, where the government's net worth exhibit failed to reflect any currency on hand (other than a constant check-cashing fund of $2500 and a small amount recorded on his business books) at the beginning of the prosecution period, notwithstanding independent evidence, including admissions of the government's chief witness, of large amounts of currency owned or controlled by petitioner at that time, is contrary to the rule of this Court in *Holland v. United States*, 348 U. S. 121 (1955), and is in direct conflict with the decision of the Court of Appeals for the Second Circuit in *United States v. Frank Costello*, 221 F. 2d 668 (1955).

In the *Holland* case, this Court declared:

> "We agree with petitioners that an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends en-

tirely upon the inclusion in this sum of all assets on hand at the outset."

In the *Costello* case, the Court of Appeals for the Second Circuit, after pointing out (p. 671) that there was no item of cash on hand in the government's net worth computation at the beginning of the year 1946 (the first year of prosecution) and that the net worth at the beginning of each year would be falsified to the extent that any such sum was omitted, said (p. 672):

> "Thus, the issue is narrowed to whether Costello had an accumulated cash reserve at the beginning of 1946, out of which the purchases might have come that were shown to have been made, and not declared. Since the aggregate of the net income omitted during the 'indictment years,' when computed as we have described, came to more than $100,000, perhaps it might have been fair to start with an assumption that no such hypothetical reserve covered the unreported income for at least the year 1949. However, the prosecution did not rely on such an assumption; *it undertook to establish that Costello had no reserve whatever on January 1, 1946.*" (Emphasis supplied.)

After noting that the defendant was a gambler and that his situation "was far from ordinary," the court concluded (p. 673): "Considering the admonition with which the Supreme Court has hedged about the 'net worth method', we cannot therefore agree that the evidence, taken as a whole, justifies the inference that he had no reserve on January 1, 1946." It then held (p. 673) that there was insufficient evidence to support the verdict of guilty on the second count (1947).*

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* The jury had acquitted the defendant on the first count (1946), in which only $1,541 was alleged to have been unreported. The amount of unreported income alleged in the second count was $36,730. Thus the court recognized that instead of a concealed cash reserve of zero, as the government had presumed, such reserve amounted to at least $38,271.

In the case at bar, the petitioner, like the defendant in the Costello case, was in a "far from ordinary" situation. He too had been engaged in gambling activities on a large scale (R. 25-26, 149); he borrowed large sums from his bank, ranging up to $80,000, *without security* (R. 75-76); he was observed by his banker to have a large quantity of cash in his safety deposit box (R. 76) and by his brother to have cash secreted in one of his time-lock safes (R. 58); he owned and used three safes at his place of business (two of which were time-lock safes, one weighing three tons and formerly used as a bank vault) and one at his home (R. 6, 82-83, 148); he reported $117,000 net income for the seven-year period preceding the prosecution period, including $46,000 for the year 1946, and was alleged by the government to have had an additional $69,000 income during the same seven-year period on the basis of an increase in *visible* assets alone (Exh. 14 at R. 143)!

Nevertheless, the government's chief witness, who prepared the net worth exhibit, inferred that the petitioner's concealed cash reserve on January 1, 1947, was zero (R. 47)! All things being equal, it would seem that the inference could just as well have been that the defendant's cash reserve was large enough to cover his net worth increase during the years 1947 and 1948. But all things were not equal. Thus, the government's chief witness admitted that the petitioner must have had at least $20,000 in concealed currency on August 1, 1946, and that he had not included this in petitioner's net worth as of January 1, 1947, because he had speculated that it "might" have been used up during the interim five-month period (R. 47-48). The same witness, producing a record

of cashier's checks showing that petitioner purchased checks on January 1, 1947, for $2,500 and on January 20, 1947, for $9,000, admitted that the purchase money did not come out of petitioner's bank accounts and was purchased with currency or undeposited funds (R. 48). He further admitted that petitioner's interest in a gambling syndicate backroll had not been included in the January 1, 1947, net worth (R. 57).

The decision of the court below, permitting a jury in the case of such circumstances to speculate that the petitioner had no concealed cash reserve at the beginning of the prosecution period, is thus in conflict with the decision of the Second Circuit in the *Costello* case, and if not reversed will result in the emasculation of this Court's decision in the *Holland* case.

As to Question 2

The court below, among other things, held (p. 315) that the main point in controversy revolved around the claim of the petitioner that on or about December 31, 1939, he had in his possession $90,000 in currency. Thus it completely confused the beginning point of the *civil* tax case with the beginning point of the *criminal* tax case. Even the government's chief witness recognized the irrelevancy of the December 31, 1939, cash position. He pointed out that if the petitioner had $30,692.32 in cash reserve on December 31, 1947, there would not be any unreported income for 1948; and if the petitioner had $69,000 in cash reserve on December 31, 1946, there would not be any unreported income for 1947 or 1948 (R. 47). In short, whether there was $90,000 or $80,000 or 15 cents in cash

reserve on December 31, 1939, didn't make any difference (R. 50)!

In *Smith v. United States,* 348 U. S 147 (1955), this Court said: "Without proof that assets on hand *at the beginning of the prosecution period* did not account for the alleged net worth increases, the Government could not succeed." (Emphasis supplied.) The lower court's disregard for this fundamental principle should be reviewed.

As to Question 3

During the trial, the government's chief witness admitted that he never bothered to ask the petitioner how much currency he had in his safes or cash in his bank box on December 31, 1946, and that the only date for which he had asked him regarding the amount of currency on hand was December 31, 1939 (R. 53). The petitioner's estimate of the amount of currency on hand on December 31, 1939, was subsequently incorporated in an affidavit drawn up by the special agent and signed at his request. The dereliction of the Government could, perhaps, be explained by the concern of the agents in establishing petitioner's civil liability for the period 1940 through 1950. However, once a recommendation for prosecution was decided upon, it is inexcusable that they did not bother to make essential inquiry into petitioner's currency position at the beginning of the prosecution period.

The court below sought to excuse this failure in these words (p. 317):

> "If the government agents did not ask the appellant the specific questions as to how much currency he had in his safe or cash in the bank box on December 31, 1946, then it must be asserted on behalf

> of the government that neither did the appellant make any reference thereto in his detailed affidavit which was gone over and corrected by him and his counsel. *He remained quiet at his peril.*" (Emphasis supplied.)

Such a holding is the antithesis of the rule of this Court in the *Holland* case that when the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, its case might fail if relevant leads furnished by the taxpayer are not tracked down. The court below would require that when a taxpayer is asked about his currency as of a certain date, he must tender unrequested answers to unstated questions regarding any date that might fall within a potential prosecution period, at the peril of such information becoming material in the event of subsequent criminal action. Being in conflict with the above rule in the *Holland* case, this holding should be reviewed.

As to Question 4

In his Instruction No. 13, the trial court attempted to explain the theory of the net worth method, pointed out that the only years involved in the indictment were 1947 and 1948, and then proceeded to mislead the jury by directing it as follows (R. 119):

> "* * * If you find, however, that the Government has established with a reasonable degree of accuracy the defendant's net worth at the beginning of the period, Jan. 1, 1940, and at the end of the period, Dec. 31, 1948, then you are justified in accepting the amounts in Exhibit 14 as correct."

Thus the jury was not permitted to find that, while the petitioner had unreported income during this nine-year period, *it was not earned during the prosecution years!*

In an effort to offset the prejudicial effect of this erroneous instruction, petitioner requested the following instruction (R. 127):

> "If you find that there was unreported income of the Defendant, but that this income was earned prior to 1948, you will find for the Defendant on Count 2.
>
> "If you find that there was unreported income of the Defendant, but that this income was earned prior to 1947, you will find for the Defendant on Count 1."

This instruction was refused. Petitioner's assignment of this error to the court below brought forth this statement (p. 323):

> "* * * The court did not give requested Instruction No. 7, stating that it was *adequately* covered by other instructions. *We believe the court was correct.*" (Emphasis supplied.)

Here again, the court below overlooked another admonition of this Court in the *Holland* case:

> "* * * There is great danger that the jury may assume that once the Government has established the figures in its net worth computation, the crime of tax evasion automatically follows. The possibility of this increases where the jury, *without guarding instructions,* is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence, which gave rise to them." (Emphasis supplied.)

If the *Holland* case is to be more than an empty shell in the Court of Appeals for the Eighth Circuit, certainly this error should be reviewed.

CONCLUSION

It is submitted that the questions raised by this petition are of such fundamental importance to the just administration of criminal tax law as to cry out for determination by this Court. A writ of certiorari to the Court of Appeals for the Eighth Circuit to review the judgment of affirmance is accordingly respectfully requested.

Respectfully submitted,

JACK R. MILLER,

Counsel for Petitioner.

APPENDIX

OPINION

JOHN P. KAMPMEYER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 15276

UNITED STATES COURT OF APPEALS

Eighth Circuit

November 22, 1955

Louis E. Lipp, Omaha, Neb. (Bernard J. Boyle, Boyle & Hetzner, Fred S. White, White, Lipp & Simon, Omaha, Neb., and Charles W. Bowers, Des Moines, Iowa, were with him on the brief), for appellant.

Roy L. Stephenson, U. S. Atty., Des Moines, Iowa (H. Brian Holland, Asst. Atty. Gen., John H. Mitchell, Joseph M. Howard and Dumond P. Hill, Sp. Assts. to the Atty. Gen., and John C. Stevens and Robert J. Spayde, Asst. U. S. Attys., Des Moines, Iowa, were with him on the brief), for appellee.

Before STONE, WOODROUGH and VOGEL, Circuit Judges.

VOGEL, Circuit Judge.

Appellant herein was found guilty in two counts of an indictment charging him with wilful attempts to defeat and evade a large part of his income taxes for the years 1947 and 1948 in violation of Section 145(b) of the Internal Revenue Code of 1939, 26 U.S.C.A. Specifically, the government charged that for the year 1947 the appellant filed a

* Page numbers that follow are from official reporter for convenience of the Court where references thereto are made in Petition.

false and fraudulent return showing his net income at $13,314.09 and the amount of tax due and owing thereon to be $3,358.31, whereas, the government alleged that for the said year 1947 the appellant's net income was $51,786.40, upon which he owed a tax of $26,039.31. With reference to the year 1948, it was alleged that the appellant filed a false and fraudulent return showing a net income of $22,485.80 with a tax due in the amount of $5,036.36, whereas his net income for said year totalled $53,178.12, upon which he owed a tax of $18,047.00.

Upon being found guilty by a jury, the appellant was sentenced to imprisonment for two consecutive terms of three years and fined $7,000.00 on each count.

The appellant was the operator of a billiard parlor and a bowling alley but derived additional income from a drive-in theater, a horse racing stable and from gambling. In connection with the billiard parlor, he operated two separate types of lottery, one called "Baseball" and the other "Tip Tickets".

The government attempted to establish its case by the net worth method, and in conjunction therewith offered and there was received in evidence what is designated as Exhibit No. 14. Exhibit No. 14 is a summary of the government agents' findings based upon the testimony and other evidence in the case. The exhibit sets forth in detail the appellant's liabilities and assets beginning with December 31, 1939. It shows the net worth as of that date to be $53,577.19. Yearly thereafter, through December 31, 1948, there appears the appellant's net worth arrived at through computing the assets and liabilities of each year. The net worth as of December 31, 1946, immediately preceding the indictment period, was $197,443.29; on December 31, 1947, it was $223,576.54; and on December 31, 1948, it was $273,146.61, an increase during the two indictment years of $75,703.32.

The exhibit also shows appellant's estimated net income for each one of such years and it includes the net income as reported by the appellant in his income tax returns and the additional income upon which the government claims the appellant paid no tax during all of those years, with the exception of the year ending December 31, 1946, in which the government agents found that the appellant overstated his income by the sum of $275.43.

The appellant did not testify in his own behalf but his position with reference to the government's charge becomes apparent through affidavits given to the government agents during the investigation and his oral statements in reply to the agents' questions. As in all cases, where the taxpayer's books are inadequate and incomplete and an attempt to establish failure to pay the proper tax is based upon use of the increase in net worth method, discrepancies and differences appear. That the appellant's books were inadequate and incomplete appears clear from the appellant's statements to the effect that with reference to his gambling income he did not keep records for fear local authorities might procure them and he admits that his reported income might have been understated by "about forty thousand dollars during the period 1940 to 1950 inclusive; that most, if not all of this understatement would have occurred during the war years, 1942, 1943, 1944 and 1945;". It is also apparent that with respect to the income from lotteries, such as Baseball and Tip Tickets, only the net was reported in the books, and consequently there was no possibility of the government agents checking gross income therefrom or doing an accurate job of accounting.

The main point in controversy, however, revolves around the claim of the appellant that on or about December 31, 1939, he had in his possession in various safes and on his person $90,000.00 in currency which he claims to have accumulated between the years 1907 and 1939. In ascertaining the basis for Exhibit 14, the agents disregarded this claim. They based this refusal on their examination of appellant's income tax returns for years prior to the years under

inspection, by the introduction into evidence of financial statements given by the appellant on June 4, 1940, in connection with an application for a loan, and on August 1, 1946, given for the same purpose, together with a transcript of his testimony in a divorce proceedings between appellant and his first wife in 1932, in which he claimed that he was operating his business at a loss and was extremely hard up for money.

[1] It must be conceded that if the appellant's claim that he had $90,000.00 in currency on December 31, 1939, was correct, then the government's case must fall, as such an accumulation of currency could at least to a large extent explain what otherwise might appear as income during subsequent years. It is apparent that the jury disbelieved his claim with reference to the accumulation of such a large amount of currency and such disbelief or finding is amply supported in the record.

Appellant's first ground for appeal is:

"The trial Court erred in admitting and not withdrawing the Revenue Agents' net worth summary, Exhibit 14."

Appellant quotes from Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, and companion cases, with reference to the guideposts the Supreme Court has set up for use of the trial courts and the appellate courts where the government has used the increase in net worth method of attempting to prove its case. He criticizes what he terms the government's failure "on the very threshold of its responsibility by avoiding the essential inquiry as to the taxpayer's currency position at the start of the prosecution years (as finally selected by the Agents) or for that matter, at the start of any year closer thereto than seven years earlier" We think appellant's criticism is unjustified.

According to the testimony, the agents' first step was to verify, if possible, the existence of the claimed $90,000.00 in currency as of January 1, 1940. The agents testified that they examined bank records and balances, business transaction records in the taxpayer's books, loan accounts at banks and public records as well as court records. The indication is that the agents did everything they could to verify the existence of the claimed $90,000.00. They found no justification for such claim and accordingly did not consider it in computing the appellant's net worth at the beginning of the period examined.

[2] The appellant's signed financial or credit statements, his testimony in the divorce proceedings in 1932, his obtaining money in subsequent years from his wife's postal and savings accounts, the liquidation of stock and a life insurance policy are strange actions for one who had in his possession this large amount of cash. It was claimed by appellant that he had approximately $50,000.00 in cash which he gave to his father for safekeeping in about 1932, yet at the same time he testified in his divorce proceedings to the effect that he was operating at a loss and he subsequently asked the court having jurisdiction of the divorce proceedings to set aside an alimony decree for the support of his wife and minor child in the amount of $40.00 per month because of economic conditions necessitating his borrowing money. This was competent evidence to justify the agents' refusal to include the alleged $90,000.00 in their summary.

The claim here is that the agents failed to make "essential inquiry as to the taxpayer's current position at the start of the prosecution years". An examination of Kampmeyer's affidavit of January 23, 1952, which was gone over by Kampmeyer and his counsel before it was executed, indicates that the main concern of the taxpayer was with reference to getting credit for the $90,000.00 as of January 1, 1940. Nowhere therein does he suggest the subsequent accumulation of an additional sum in cash to make up for the unreported income in the prosecution years of 1947 and 1948. Appellant's counsel criticize failure of the government agents to follow "leads" given to them by the appel-

lant and cite Holland v. United States, supra. That case refers to the necessity of the government agents following "relevant leads". Vague gambling earnings, oral claims to large bills in safes and deposit boxes, the changing of large bills to smaller ones are hardly in the category of "relevant leads" as referred to by the Supreme Court in the Holland case. They are not "leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence". The government agents could hardly be expected in 1952 to check the veracity of empty assertions of the appellant that in years prior thereto he had had huge amounts of cash or currency stacked away in safes or deposit boxes in banks. With reference to the burden of proof remaining on the part of the government, the Supreme Court in the Holland case said at page 138 of 348 U.S., at page 137 of 75 S.Ct.:

> "But where relevant leads are not forthcoming, the Government is not required to negate every possible source of nontaxable income, a matter peculiarly within the knowledge of the defendant. See Rossi v. United States, 289 U.S. 89, 91–92, 53 S.Ct. 532, 533, 77 L.Ed. 1051.
>
> "Nor does this rule shift the burden of proof. The Government must still prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty. The settled standards of the criminal law are applicable to net worth cases just as to prosecutions for other crimes. *Once the Government has established its case, the defendant remains quiet at his peril.* Cf. Yee Hem v. United States, 268 U.S. 178, 185, 45 S.Ct. 470, 472, 69 L.Ed. 904. The practical disadvantages to the taxpayer are lessened by the pressures on the Government to check and negate relevant leads." (Emphasis supplied.)

[3] If the government agents did not ask the appellant the specific question as to how much currency he had in his safe or cash in the bank box on December 31, 1946, then it must be asserted on behalf of the government that neither did the appellant make any reference thereto in his detailed affidavit which was gone over and corrected by him and his counsel. He remained quiet at his peril. The lack, if there be one, went to the weight of the evidence, not to its admissibility. We think the government agents exhausted all material and relevant leads furnished them and find no justification for criticism. The most that can be said for appellant's objection is that he did not agree with the summary or its conclusions.

This court has frequently sanctioned the use of summaries in income tax evasion cases. See Heasley v. United States, 8 Cir., 218 F.2d 86, 89–90; Banks v. United States, 8 Cir., 204 F.2d 666, 670–671, remanded 348 U.S. 905, 75 S.Ct. 311, reaffirmed, 8 Cir., 223 F.2d 884; Hanson v. United States, 8 Cir., 186 F.2d 61, 67; Leeby v. United States, 8 Cir., 192 F.2d 331. Furthermore, in dealing with the government's computations under somewhat similar circumstances, the Court of Appeals for the 6th Circuit, in Gariepy v. United States, 189 F.2d 459, 462, said:

> "The transactions upon which this computation was made are all sustained by evidence. They were not successfully controverted. It is true that appellant's counsel made vigorous attacks upon the accuracy of the computation. *At best it was, of course, but an estimate, but as an estimate it was entitled to the consideration of the jury because based on substantially the entire evidence in the record.* United States v. Johnson, 319 U.S. 503, 519, 63 S.Ct. 1233, 87 L.Ed. 1546; Bell v. United States, 4 Cir., 185 F.2d 302. The principal attack of the appellant upon the evidence which sustains this computation is two-fold. The first is the challenge to the accuracy of the appellant's net worth, or lack of it, at the base period, and secondly is the contention that each item

of evidence must be so fully and accurately established that it permits no reasonable doubt as to the fact upon which reliance is placed. As to the first contention, all of the evidence, and that includes testimony of reluctant witnesses permitted to be cross-examined as hostile, points with great persuasiveness, if not indeed conclusively, that when the appellant began his professional practice in 1937 he was without assets and heavily in debt. As to the second, the appellant appears to confuse the function of the court with that of the jury. In United States v. Valenti, 2 Cir., 134 F.2d 362, 364, certiorari denied 319 U.S. 761, 63 S.Ct. 1317, 87 L.Ed. 1712, Judge Clark made a careful study of the applicable rule, and we accept fully his conclusions. 'The requirement of proof beyond a reasonable doubt is a direction to the jury, not a rule of evidence; it operates on the whole case, and not on separate bits of evidence each of which need not be so proven; and it cannot be accorded a quantitative value other than as a general cautionary admonition (citing cases). It is the court's function to decide whether evidence is competent to justify certain inferences; it is not the court's function to decide which of various inferences should be drawn.'" (Emphasis supplied.)

Exhibit 14, which the appellant questions, was supplemented by what has been referred to as Exhibit 14A. Exhibit 14A is a stipulation entered into between the government and the appellant. It provided as follows:

"It is stipulated and agreed by and between the plaintiff and defendant that Exhibit '14' except items 2 & 26 contains a list of defendant's assets, liabilities and living expenses for the years 1939 to 1948, inclusive, and to the extent only that said items are contained in said Exhibit, the same are correct.

"It is understood by the parties that defendant claims that there are other assets and liabilities that are not listed in said Exhibit and reserves the right to offer evidence of such other assets and liabilities.

"It is also understood by the parties that defendant does not agree that the summary of gross income, net income and additional income is a correct summary of said items.

"The defendant waives identification of the Exhibits relating to the items contained in Exhibit '14', and consents to the use of secondary evidence of the contents of the books and records referred to in said Exhibit.

"This Stipulation shall not operate as a limitation upon the right of either party to introduce other evidence upon the matters contained in said Exhibit '14', and defendant reserves the right to object to the admissibility of said Exhibit '14' except as to the identification & secondary character of the items therein. This Stipulation shall be binding on the parties hereto only in this proceeding.

"Signed at Des Moines, Iowa, this 17 day of June, 1954."

[4] Of the two exceptions referred to above, Item 2 covers "cash in banks" which, of course, was disputed by appellant, and Item 26 referring to the value of certain real estate estimated by the government agents at $10,000.00 for each of the years 1947 and 1948. As was stated in the Gariepy case, supra, the government's computation was at best but an estimate. It was, however, entitled to the consideration of the jury. We believe there was ample basis for the introduction of the summary and that the weight to be given it was for the jury.

Appellant's second point is:

"The Trial Court erred in admitting and not withdrawing appellant's income tax returns for 1940

to 1946 and record of year-end bank balances for 1939 to 1946."

This court has approved in a number of cases the use of income tax returns covering years prior to the indictment years. In Mitchell v. United States, 8 Cir., 208 F.2d 854, 857, remanded 348 U.S. 905, 75 S.Ct. 311, reaffirmed 8 Cir., 221 F.2d 554, this court said:

"Over Defendant's objection the government was permitted to introduce in evidence income tax returns made by Defendant covering years prior to the years here involved and also to introduce proof that Defendant made no income tax returns during certain prior years. We think the evidence was admissible. Leeby v. United States, supra; Hanson v. United States, 8 Cir., 186 F.2d 61; Schuermann v. United States, 8 Cir., 174 F.2d 397. A like contention was urged in Leeby v. United States, supra, and in the course of that opinion it is said, inter alia, 'In estimating defendant's income on the receipts and disbursements basis, or on the net worth basis, the witness considered the question of his income or want of income prior to 1944 and we think the testimony was admissible for that purpose and the court carefully limited it to that purpose.'"

In connection with the receipt in evidence of the 1940–1946 returns, the trial court herein instructed the jury as follows (Instruction No. 14):

"The witness, Mr. Sklenicka, was permitted and used the returns for earlier years as showing the reported income of the defendant in connection with the net worth theory. It was appropriate for him and is appropriate for you to use and consider those returns for such purpose and in your determination of defendant's net worth for the years 1947 and 1948 as bearing upon the amount of income tax defendant should have paid in 1947 and 1948; and in your reference to such prior returns to aid in that determination, you may view such prior returns for such bearing and weight as you believe they should have on the question of defendant's intent *or lack of intent* to evade payment as to the taxes due for 1947 and 1948." (Emphasis supplied.)

[5] We hold that the tax returns for the years subsequent to the starting point of the computation with reference to net worth were entirely competent and no error was committed in their receipt.

Appellant also objects to the use by the government agents of year-end bank balances. Such yearly bank balances were utilized by the government agents in the preparation of Plaintiff's Exhibit 14, being reflected there as Item No. 2. There was introduced into evidence Exhibit 46 which was "a break down of the amounts entered in item 2 of Exhibit 14". The objection to Exhibit 46 during the trial was as follows:

"Mr. Bowers: The defendant objects to all of that portion of Exhibit 46 relating to the years 1939 and 1946, inclusive, as being transactions other than those alleged in the indictment and for years prior to 1947 and 1948, and therefore irrelevant, immaterial and incompetent."

The court admitted the exhibit,

"* * * for all purposes for such assistance that it will be to the jury as a breakdown of the summary that is already in evidence for that particular item, and for the reason that it was gone into on cross-examination."

[6] We think there was no error in the admission. In the preparation of a net worth summary, it seems to us proper that the yearly bank balances be shown. In Exhibit 14A, supra, the appellant questioned Item 2 and "reserves the right to offer evidence of such other assets and liabilities". He failed to do so. Under the circumstances, we believe it was entirely proper for the figures regarding year-end bank balances to go

before the jury for such weight as the finders of the facts believed them to be entitled.

Appellant relies upon Vloutis v. United States, 5 Cir., 1955, 219 F.2d 782, 788. That case is not support for appellant's contention under the factual situation confronting the court in this case. Therein, the appellant had objected to,

"* * * evidence concerning his bank deposits, withdrawals and year-end balances for certain periods during the prosecution years and prior thereto."

The court stated, at page 788:

"We find nothing improper in the admission of such evidence where it clearly relates to and forms a part of the factual ingredients of the Government's case and has probative value; indeed, the proper revelation of appellant's financial history and the computation of his worth required that all financial transactions be checked, including banking transactions. However, some of the Government's evidence had no relation to this permissible inquiry."

Thereafter, the court refers to year-end balances going back many years and states:

"* * * it is our opinion that the year-end balance of a bank account, *standing alone*, is a fact which has absolutely no necessary connection with the amount of money available, or even deposited during the year. When the Government used only that figure for the years prior to the prosecution period and *when the balances for the consecutive years were announced at length in rapid succession, it forcefully presented to the jury meaningless evidence with the expressed purpose of impressing the jurors with the belief there was relatively little money available for accumulation.* Such evidence was not admissible in that form and was clearly prejudicial to appellant." (Emphasis supplied.)

That is not the situation in the instant case. The bank balances referred to covered only the particular years under investigation beginning with 1939. They were part and parcel of the government's net worth computations as contained in Exhibit 14, "the factual ingredients of the Government's case". The admission of the yearly bank balances as a breakdown of part of Exhibit 14, which included a statement of appellant's other assets and his liabilities, was entirely proper.

Appellant's third point is:

"The Trial Court erred in admitting and not withdrawing records of tax assessments, tax returns, documents and other exhibits dealing with transactions prior to 1940."

[7, 8] Appellant had claimed to have accumulated $90,000.00 in currency between 1907 and 1940 and that he had gradually invested a large part of such cash accumulation during "1942 and in succeeding years". Appellant's statements to the agents were inconsistent. Originally he claimed to have had no more than $20,000.00 or $30,000.00 at any time or possibly $50,000.00 in cash in 1940. Subsequently he claimed the amount was $90,000.00. It was necessary, under Holland v. United States, supra, that the government agents check the "leads" given to them, which investigation might prove the truth or falsity of the taxpayer's assertion regarding the accumulation of undisclosed funds. Certainly, an examination of the record during the period in which the appellant claimed he accumulated the cash was indicated and entirely proper. No error was committed in admitting the records.

Appellant's fourth point is:

"The Trial Court erred in denying appellant's motion for acquittal."

[9] What we have already said justifies little further comment on this score. The agents' summary, Exhibit 14, disregarded appellant's statement with reference to the accumulation of a large amount of cash on December 31, 1939. The evidence was sufficient to

justify such discounting or disbelief. There was, however, a question of fact for the triers thereof as to the accuracy of the government's computations and certainly the question of intent was also one for the jury. Appellant's motion for acquittal was properly denied.

Appellant's fifth point for appeal is:

"The Trial Court erred in giving certain instructions and in failing to give other instructions."

Appellant's main complaint is that, "The Court's instruction No. 13, not only does not meet the standard of lucidity and completeness in acquainting the jury with the nature of the net worth method and does not set out 'the assumptions on which it rests and the inferences available both for and against the accused,' it is, in truth, a misstatement of its scope and significance."

The record indicates that the court prepared written instructions, giving copies to counsel. Thereafter, and before the charge was read to the jury, counsel on each side were given an opportunity to take their exceptions.

[10] Appellant's first exception to Instruction No. 13 had to do with the addition of the words "gifts and inheritances", following the word "income". The court adopted the appellant's suggestion. Appellant's next objection or exception thereto was as follows:

"Mr. Bowers: Defendant further excepts to Instruction Number 13 in that on the second page of said instruction in the paragraph commencing 'there are in evidence here certain affidavits of the defendant, in one of which he claims to have had $90,000 in currency on or about January 1st, 1940, following the completed purchase of a farm in Hinton, Iowa.' The defendant believes that in regards to said $90,000 that the date was indefinite, and that it was after January 1st, 1940, and that there was testimony that in 1940 also he had some $50,000, so there is testimony relating to an item of $50,000, and there was also testimony later in the year as to an item of $90,000.

"The Court: I interpreted it to include both."

We find no error in connection with the court's action on appellant's second exception to Instruction No. 13.

The next exception to Instruction No. 13 is most strenuously relied upon by the appellant in this appeal. It is as follows:

"Mr. Bowers: Yes. Now, we further object to that instruction for the reason that it confines the findings of the jury to this sum of $90,000 and it confines the right of the jury to challenge the accuracy of Exhibit 14 solely by the exclusion of this sum of $90,000, and we think that there should be inserted in there in that paragraph—that in the succeeding paragraph I find this phrase: 'If you find from all of the evidence in this case that defendant had $90,000 in currency on hand as above on January 1, 1940, then Exhibit 14 is inaccurate in that it would not have taken into account all of defendant's assets.' We think there should be added after the word '$90,000' or any other sum of money in safety deposit boxes or safes."

That portion of the charge to which exception is taken has reference to the appellant's financial situation as of January 1, 1940. Appellant's suggestion for healing what he claimed was an error was that the words "or any other sum of money in safety deposit boxes or safes" be added thereto. There was no evidence in the record with reference to any sum possessed by the appellant on or about January 1, 1940, with the exception of the claimed $90,000.00 in currency. Appellant's own affidavit sworn to as of January 23, 1952, states in part as follows:

"That on or about January 1st, 1940, after I bought and paid for my farm near Hinton, Iowa, I owned and possessed about ninety thousand dollars of cash money; that

this amount of money consisted wholly of currency which I then had on hand and in my possession; * * *" (In a subsequent affidavit dated February 8, 1952, defendant corrected this, insofar as the date January 1, 1940, is concerned by including the words "or 1941".)

[11, 12] The trial court's refusal to amend the charge in accordance with the suggestion of appellant's counsel by including "or any other sum of money in safety deposit boxes or safes" was entirely justified. The particular instruction attacked had reference to the situation as of January 1, 1940. True enough, the record contains vague references to the period subsequent to January 1, 1940, as to large bills in safes, changing large bills to small, gambling winnings of approximately $40,000.00, and purchases of two notes in January, 1947, from unknown funds. These, however, all had to do with the situation subsequent to January 1, 1940. No specific reference thereto was called to the trial court's attention and no proper exception was taken thereon. The inclusion of the words suggested, "or any other sum of money in safety deposit boxes or safes", would have been meaningless insofar as January 1, 1940, was concerned. There was no such evidence. Appellant's after-thoughts of criticism, not called to the attention of the trial judge, and raised here for the first time, may not be considered by this court unless we find that the instructions were so completely erroneous as to result in a miscarriage of justice. Mitchell v. United States, supra. We do not so find.

[13] Appellant took exception to what was designated as Instruction No. 14, supra. Appellant's exception to Instruction No. 14 was as follows:

> "Mr. Bowers: Defendant further excepts to Instruction Number 14, particularly the latter part of said instruction referring to the---refers to the bearing of prior returns on the question of intent. We think that there should be added to that instruction before the jury can use the prior returns—the returns for the years prior to 1947 and '48 as bearing on the question of intent they must first find that the returns filed for those years were false and fraudulent and filed wilfully with intent to defraud the government."

We do not think failure to so instruct was fatal to the charge. In Instruction No. 14 the jurors were told that they might consider those returns in determining the appellant's net worth for the years 1947 and 1948. That purpose was proper. The exhibits were then before the jury. They were also told that they could "view such prior returns for such bearing and weight as you believe they should have on the question of defendant's intent *or lack of intent* to evade payment as to the taxes due in 1947 and 1948". (Emphasis supplied.) In other words, if the jurors found in the prior returns no wilful attempt to evade payment of tax, it would have a bearing upon his lack of fraudulent intent in filing his returns in 1947 and 1948, and would operate to negate the government's charge as to such years. If they found that in the prior returns he did wilfully and frauduiently attempt to evade payment of tax, they could use that as bearing upon the question of his intent in filing his 1947 and 1948 returns. Appellant cites Hartman v. United States, 8 Cir., 1954, 215 F.2d 386, 393. That case is not support for appellant's contention. Therein, this court said at page 393:

> "In order for wrongful acts not included in a charge to be admissible to prove intent *they must be of such a character that as a matter of logic they tend to demonstrate a criminal intent in the acts within the charge.* Wolcher v. United States, 9 Cir., 200 F.2d 493." (Emphasis supplied.)

As we have demonstrated, the prior returns were admissible insofar as they might have a bearing on the establishment of net worth. They did, then, have some connection with the charges in the instant case. Furthermore, the appel-

lant, in his affidavit, admits that the prior returns were incorrect in that they understated his income by "about forty thousand dollars during the period 1940 to 1950 inclusive; that most, if not all of this understatement would have occurred during the war years, 1942, 1943, 1944 and 1945". The appellant's own statement makes the returns admissible on the question of intent and we believe the trial court properly instructed the jury with reference thereto. We find no error therein.

[14] In appellant's brief, he calls attention to the court's failure to give Defendant's Instruction No. 7, which reads as follows:

> "If you find that there was unreported income of the Defendant, but that this income was earned prior to 1948, you will find for the Defendant on Count 2.
>
> "If you find that there was unreported income of the Defendant, but that this income was earned prior to 1947, you will find for the Defendant on Count 1."

The court did not give requested Instruction No. 7, stating that it was adequately covered by other instructions. We believe the court was correct. Continuously through the instruction he cautioned the jurors that the charges against the appellant of knowingly and wilfully attempting to defeat and evade his income tax were confined to the years 1947 and 1948, "It is those years that are involved in the indictment."

We have examined the court's entire charge in detail. In our opinion, the jury was not misled nor was there any resultant misunderstanding or confusion. The instructions covered the increase in net worth theory and properly limited the use of evidence covering years prior to the indictment periods. Plaintiff's Exhibit 14 covered the period from December 31, 1939 to December 31, 1948. Plaintiff's Exhibit 14A, supra, stipulated that with the exception of Items 2 and 26 Exhibit 14 was correct as far as it went. In other words, all figures contained therein, with the exception of the conclusions, of course, were accurate, but the appellant claimed that there were other assets and liabilities and reserved the right to offer evidence on such other assets and liabilities. This he failed to do. The appellant "remained quiet at his peril". The main and overriding objection to Exhibit 14 was that it did not include appellant's claimed accumulation of $90,000.00 in currency as of December 31, 1939. We think the jurors so understood from the evidence, from Exhibit 14 and from the court's instructions. They were specifically told that the appellant was charged with a violation of the income tax laws for the years of 1947 and 1948 only. We do not think this was in any way confusing to the jury or misleading. We find no error in the court's instructions.

Appellant's last point is:

> "The Trial Court erred in permitting the U. S. Attorney to make improper comment in his summation to the jury."

[15] At the opening of the trial, the United States Attorney requested that the court order all witnesses excluded from the courtroom during the trial with the exception of an Internal Revenue Special Agent. After discussion, it was agreed that the appellant might retain two accountants at his counsel table. One of such accountants was called as a witness for the government, but neither testified for the defense. In his argument to the jury, the United States Attorney directed attention to the fact that the appellant had accountants present in the court room and that not one of them took the witness stand to verify any of the facts and circumstances in appellant's records. Exception was taken and the trial court overruled. It was claimed by the government that the appellant's records were inaccurate and incomplete. The appellant had received permission to keep his two accountants in the court room and at counsel table during the trial of the case. We think it was not unreasonable for the trial court to allow the United States Attorney to direct the jurors' attention

to that fact, which was, of course, perfectly obvious. See United States v. Beekman, 2 Cir., 155 F.2d 580, 584; Wigmore, Evidence, § 288. Considering all the circumstances in the trial, it was a discretionary matter and no error was committed.

Viewing the case in its entirety, we are of the opinion that the appellant had a fair trial and accordingly the case is affirmed.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 15276

September Term, 1955
Tuesday, November 22, 1955

JOHN P. KAMPMEYER, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	Appeal from the United States District Court for the Southern District of Iowa

This cause came on to be heard on the record from the United States District Court for the Southern District of Iowa, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the Disrtict Court, John P. Kampmeyer, do surrender himself to the custody of the United States Marshal for the Southern District of Iowa, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

November 22, 1955

ORDER DENYING PETITION OF APPELLANT FOR REHEARING

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15276

September Term, 1955
Monday, December 19, 1955

JOHN P. KAMPMEYER, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	Appeal from the United States District Court for the Southern District of Iowa

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Petition of appellant for a rehearing filed in this cause has been considered and It is now here Ordered by this Court that said petition be, and it is hereby, denied.

December 19, 1955.

NO. 608 MISC.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

JOHN P. KAMPMEYER, Appellant

vs.

UNITED STATES OF AMERICA, Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

SUPPLEMENT TO PRINTED RECORD

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Assistant Attorney General.

JOHN H. MITCHELL,
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ROY L. STEPHENSON,
United States Attorney.

JOHN C. STEVENS,
Assistant U. S. Attorney.

ROBERT J. SPATES,
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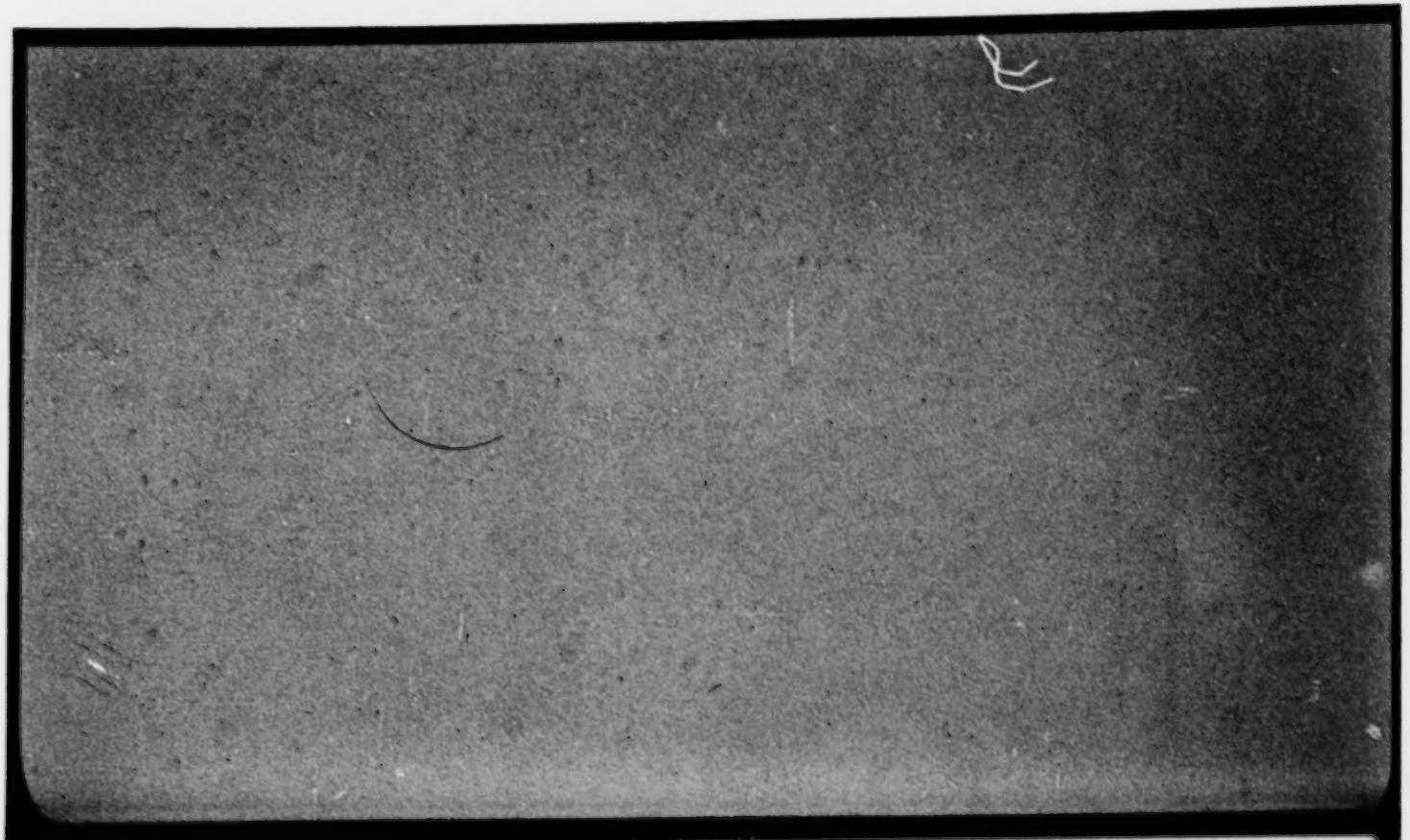
FILED

JUL 11 1955



No. 15276

CRIMINAL

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

JOHN P. KAMPMEYER, Appellant

vs.

UNITED STATES OF AMERICA, Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

SUPPLEMENT TO PRINTED RECORD

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The filed Record at page 99-100 sets out only a portion of the opening argument of the government. The full text of that portion of the argument containing the matter objected to by appellant is set out as follows:

Mr. Stephenson: I do want to say that earlier in the trial a certified public accountant was called to the stand. I called him to the stand for two purposes largely. One, he had made out the tax returns for the defendant. The defendant, of course, when he signs his return is responsible for it, but I wanted to go further and let this jury see that the certified public accountant who had helped make out the tax return had gotten his information from the defendant. And there was a second point I wanted to establish at that point early in the trial, and that was that there was included in the tax returns for 1947 the words "miscellaneous speculations," and I wanted you to see from it and hear from the mouth of the certified public accountant who made out these tax returns that the defendant had given him that information verbally, that he had given him no record to support miscellaneous speculations, and thus it was I can say to you honestly I was shocked, I was surprised when I asked a certified public accountant if there had been any conversation about miscellaneous speculations and he said there had been none, and that was why I rose and at least asked the Court for permission to cross-examine my own witness.

I asked permission to cross-examine for two reasons. Number one, of course, was this sworn statement he had made. I want to show you now Exhibit 8, which is the income tax return for 1947. You will examine it in the jury room. But in the attachments there is Miscellaneous Speculations—$31,041.17. There is this certified public account who made out this return. He remembered nothing about miscellaneous speculations, and so then after getting permission to cross-examine him and then after the defendant's counsel examined him about this conversation I was permitted and did put into evidence after going through it with the accountant his own affidavit submitted to Mr. Sklenicka. I went through it as you remember, and asked him if he didn't initial each page. He did. I asked him

if he hadn't made certain interlineations. I asked him if he hadn't initialed the changes. And then it was read to you.

Mr. Stephenson: I want to say to you now that the defendant had several accountant. . present in the court room and not one of those accountants took the witness stand to verify any of the facts and circumstances in the records.

Mr. Bowers: May it please the Court, the defendant excepts to this part of the argument as immaterial and improper that refers to the failure of the defendant to call witnesses.

The Court: I—

Mr. Bowers: In that there being no information in this record that the witnesses had any information to offer.

The Court: It is appropriate for counsel to argue as to the absence of a witness who may be qualified to testify as to a certain subject. I think in the light of counsel's preliminary statement it is not improper argument, and I refer to the preliminary statement at the opening of the trial as well as what counsel just said here in argument.

You may proceed.

Mr. Stephenson: There has been no proof, and in view of the Court's remark you can infer—that is, the absence of these accountants—their failure to give proof, that this Exhibit 14 is in error. Mr. Sklenicka has testified to it.

The Court: Mr. Stephenson, at the risk of interrupting you I should further admonish the jury that you are to draw no inference however from the fact that the defendant himself did not testify, and you will be so later instructed formally, but the fact is the defendant is not required in any sense to take the stand. I don't want you to draw any inference from that, this statement would apply only as to witnesses qualified to testify as to these counts. You may proceed, sir.

Mr. Stephenson: And while I am on that subject I might also mention there was a great big fuss and there was a lot of lengthy cross-examination of Mr. Sklenicka because he said that these books were inadequate. No one

took the stand to testify that they were adequate. No expert has taken the stand and told us these books were adequate. I'll leave it to the judgment of this jury whether these books were adequate. You wouldn't need an expert.

Now, there is no record of the South Dakota racing deal. Folks, I don't know if there was a profit or loss in the South Dakota racing deal and I don't care. We can't prove this man's income by direct evidence. We don't know about all this gambling income, how much it was. All we say to you is his records were inadequate. Here was a racing venture out in South Dakota. $85,000 went through the account. Nothing in his books and records about it. His books and records were inadequate. That's the purpose for which we offered that proof.

Plaintiff's Exhibit No. 20—Page 1

CREDIT STATEMENT---Individual

IT IS IMPORTANT THAT THIS BLANK BE FILLED OUT IN DETAIL.

To THE LIVE STOCK NATIONAL BANK, Sioux City, Iowa.

J. V. Lampmeyer — Name

Business — Address

June 4-1940 — Date of Statement

ASSETS		LIABILITIES	
Cash on Hand and in Bank	5400 -	I Owe the Following Banks:	
Merchandise			Bank 500
Grain and Farm Products		Secured by	
Loans Due Me, One Year or Less Maturity			Bank
Accounts Due Me Contract	650 -	Secured by	
U. S. Securities		Notes Payable to Relatives Aunt	1400 -
Stocks and Bonds (Itemize in Schedule)		Secured by Estate Lampmeyer	
Other Current Assets		Notes Payable to Others	
		Secured by	
511 Nebraska Grand Allens Parlor	75000 -	Accounts Payable	
		Interest and Taxes Due Within One Year	
TOTAL QUICK ASSETS	31050	TOTAL CURRENT LIABILITIES	1900
Farm Land (Itemize in Schedule)		Real Estate Mortgages (First) Farm	8000
(Improvements Valued at $)	3676		
City and Town Property (Itemize in Schedule)			
Mortgages or Loans Due After One Year		Real Estate Mortgages (Junior)	
Furniture and Fixtures	1500		
Automobile and Trucks	500		
Other Assets (Itemize in Schedule)		Interest and Taxes Delinquent	
		OTHER LIABILITIES	
Diamonds & Cash Value Life Ins.	7000 - 4000		
		TOTAL LIABILITIES	9900
		NET WORTH	68900
TOTAL	75800	TOTAL	75800

CONDITIONAL ASSETS	CONTINGENT LIABILITIES
Contract Land, Value	As endorser or guarantor on Notes of Others
Contract Against Same	As Mortgagor of Real Estate Sold
Number Acres, County,	As Security or Bondsman for Other Persons
Due, State,	On Leases or Contracts
Equity Contract Land	For Judgments or Suits Pending
Leases Rental	TOTAL
Paid to, Expires,	
No. Acres, County, State,	

I am endorser or guarantor on notes as follows:

$ Due

$ Due

$ Due

LIFE INSURANCE

Name of Company Beneficiary Amount 1000 Cash Value

COPY BOUND CLOSE

GENERAL INFORMATION

SCHEDULE OF STOCKS, BONDS AND SECURITIES.

DESCRIPTION	Par Value	Present Value

SCHEDULE OF REAL ESTATE.

DESCRIPTION Giving County and State	Title in Name of	Improved or Unimproved	No. of Acres or Lots	Present Value	Amount of Incumbrance	Rate of Int. on Mortgage	Mortgage Due
1714 Douglas	JPK			7000=			
7 houses Brunnells 801-3 Cooke				1500-			
4 lots at Marys				750-			
108-10 Jenning 1/2 Int				4000-			
110-12-14 Omaha 1/2 Int				4000			
Farm Plymouth Co							
				17000	8000		

SCHEDULE OF OTHER ASSETS 36750

DESCRIPTION	Original Value	Present Value

Insurance carried on buildings . . . . . $

Insurance carried on stock . . . . . $

Insurance carried on furniture and fixtures . $

Accident and health insurance . . . . . ?

Gross income for year . . . . . $

Total expense for year . . . . . $

Net profit . . . . . $

REMARKS

Are you a partner in any firm?

Have you a special or limited partner?

Name

Net worth

Number of year in present business

The facts and representations above made you can consider as continuing and remaining full, true and accurate unless notice of change is given you, and agreement is hereby made, to notify you promptly of any change in financial condition that materially reduces the pecuniary responsibility of the undersigned. In consideration of the granting of credit the undersigned agrees that in the event of failure, insolvency or committing an act of bankruptcy if any of the representations above are untrue; if the undersigned fails to notify you, in writing, of any change as before agreed; then, or in either case, all obligations of the undersigned held by you shall immediately become due and payable without demand or notice and the same may be charged against the balance of any account to the credit of the undersigned with you. A continuing lien is hereby given on any balance on deposit to the credit of the undersigned; also choses in action, from time to time existing, to secure all obligations of the undersigned held by you. It is hereby expressly agreed and understood that in the event I make application for further credit or for the renewal or extension of any existing indebtedness, this statement shall be a valid and binding as if delivered as a true and correct statement of my financial condition on the date such further credit, extension or renewal is requested and granted.

Witness

Dated June 4 - 1940

Signature B. Kampmeyer

SE IN CENTER

Plaintiff's Exhibit No. 21—Page 1

CREDIT STATEMENT

To THE LIVE STOCK NATIONAL BANK, Sioux City, Iowa:

Jo Lo Landgren
Name
Trader
Business

ASSETS			LIABILITIES
Cash on Hand and in Bank 1st Nat'l	Same	-	If Any the Following Items:
Merchandise			Secured by
Grain and Farm Products			
Loans Due Me, One Year or Less Maturity			Secured by
Accounts Due Me			Notes Payable to Banks
U. S. Securities			Secured by
Stocks and Bonds (Itemize in Schedule)	2000	-	Notes Payable to Others
Other Current Assets	3000	-	Secured by
			Accounts Payable
			Interest and Taxes Due Within One Year
TOTAL QUICK ASSETS	5000	-	TOTAL CURRENT LIABILITIES
Farm Land (Itemize in Schedule)	None	-	Real Estate Mortgages (First)
(Improvements Valued at $)	108,500	-	
City and Town Property (Itemize in Schedule)	7,000	-	Real Estate Mortgages (Other)
Mortgages or Loans Due After One Year			
Furniture and Fixtures Diamonds 5M			Interest and Taxes Delinquent
Automobile and Trucks 1000			OTHER LIABILITIES
Other Assets (Itemize in Schedule)			
Membership L.S.Ex	1500	-	
Cash Value Life Ins	9000	-	
Race Horses	10000	-	TOTAL LIABILITIES
			NET WORTH
TOTAL	135,000	-	TOTAL
CONDITIONAL ASSETS			CONTINGENT LIABILITIES
Contract Land, Value			As endorser or guarantor on Notes of Others
Contract Against Same			As Mortgagor of Real Estate Sold
Number Acres, County			As Security or Bondsman for Other Persons
Due, State			On Leases or Contracts
Equity Contract Land			For Judgments or Suits Pending
Leases-Rental			TOTAL
Paid to Expires			
No. Acres County, State			

I am endorser or guarantor on notes as follows:

$ Due

$ Due

$ Due

LIFE INSURANCE

Name of Company The Life Co Beneficiary Wife Amount Cash Value

Fully Paid up

GENERAL INFORMATION

Exhibit No. 21—Page 2

	Par Value	Present Value
U.S. BONDS - E. BONDS.		$1000
STOCK - 1ST NAT'L BK. S.C.		$500

SCHEDULE OF REAL ESTATE

Description Giving County and State	Title In Name of	Improved or Unimproved	No. of Acres or Lots	Present Value	Amount of Encumbrance	Rate of Int. on Mortgage	Mortgage Due
Emmett Co. Farm	Self	160		40000		6%	
House 414 Douglas	"	Home		8500		"	
[illegible] JENNINGS. 1/2 Int	"			7500		"	
[illegible]-MT OMAHA	"			10000		"	
[illegible]-NEBRASKA	"	Bldg + lot		6000	17000	To L. NAT'L B	
[illegible] PIERCE		RESTAURANT		15000		6%	
[illegible] JACKSON		FILLING STATION		7500		"	

MR + MRS JENNINGS.

SCHEDULE OF OTHER ASSETS

DESCRIPTION	Original Value	Present Value

Insurance carried on buildings . . . . . $_____

Insurance carried on stock . . . . . $_____

Insurance carried on furniture and fixtures . $_____

Life and health insurance . . . . . $_____

Income for year . . . . . $_____

Expenses for year . . . . . $_____

Profit . . . . . $_____

REMARKS

Are you a partner in any firm? _____ Have you a special or limited partner? _____

Name _____ Net worth _____

Business _____ Number of years in present business _____

The facts and representations above made you can consider as continuing and remaining full, true and accurate unless notice of change is given you, and agreement is hereby made, to notify you promptly of any change in financial condition that materially increases the primary responsibility of the undersigned. In consideration of the granting of credit the undersigned agrees that in the event of future insolvency or committing an act of bankruptcy if any of the representations above are untrue; if the undersigned fails to notify you, in writing, of any change as before agreed; then, or in either case, all obligations of the undersigned held by you shall immediately become due and payable without demand or notice and the same may be charged against the balance of any account to the credit of the undersigned with you. A continuing lien is hereby given on any balance on deposit to the credit of the undersigned; also drafts in collection, from time to time existing, to secure all obligations of the undersigned held by you. It is hereby expressly agreed and understood that in the event I make application for further credit or for renewal or extension of any existing indebtedness, this statement shall be as valid and binding as if delivered as a true and correct statement of my financial condition on the date such further credit, extension or renewal is requested and granted.

Name [redacted]

Dated 8/1[illegible]

Signature [signature]

UND CLOSE IN CENTER

PLAINTIFF'S EX. 27
MJD 6/16/54

In the District Court of Iowa, in and for Woodbury County

John Kampmeyer, Plaintiff,

vs.

Mary Kampmeyer, Defendant.

Answer to Cross Petition,
Equity No. 59047

Comes now the Plaintiff in the above entitled cause and for

Answer

to the allegations contained in Count Two of the answer and petition for separate maintainance of defendant, the same being a cross petition, the plaintiff herein states:

That he denies each and every allegation contained in said Count Two, save those hereinafter specifically admitted or otherwise answered;

• • • • •

That this plaintiff specifically denies the allegations contained in paragraph ten of said count two; and further states that instead of earning the sum of hundred dollars per week, as alleged therein; that business in his said occupation has been operated for the last fifteen months past at a loss, and that by reason thereof, this plaintiff is indebted to the Live Stock National Bank of Sioux City, Iowa, and Johnson & Toohey Commission Company at the said yards in the sum of Three Thousand dollars or more.

• • • • •

-2-

• • • • •

That the home referred to in paragraph 11 of said Count two of the defendants answer herein, was the property of plaintiff's Father at the time of the death of the plaintiff's Mother was deeded to him by said Father John Kampmey-

er Sr., this plaintiff paying the mortgage then on said home in the sum of Twenty Eight hundred dollars and plaintiff's Father reserved the right of a home there during the life time of said Father, and that plaintiff hold said real estate subject to saod right.

That the other two houses referred to in said paragraph 11 of said Count two, is not the property of this plaintiff.

That the certificate of stock referred to in paragraph 13 of said Count two, was purchased by him in the name of their son, John P. Kampmeyer Jr., whose name was John Snyder before the said marriage of plaintiff and defendant, and that stock was purchased for the sum of Thirty seven Hundred dollars, that the sum of seven hundred dollars was paid on said stock and that there is now due on said stock as a balance approximately $2646.00 and interest and that said certificate of said stock is now being held by the Sioux City Stock yards Company of Sioux City, Iowa, for the balance of said payment.

* * * * *

T. P. CLEARY

Attorney for Plaintiff.

State of Iowa, Woodbury County, ss.

John Kampmeyer being first duly sworn on oath depose and say, that I am the plaintiff in the above and foregoing action and and defendant to county two of defendant's answer herein, that he had read the above answer to the allegations contained in said count two and is familiar with the allegations contained therein and that the same are true as I verily believe.

JOHN KAMPMEYER

Subscribed and sworn to before me in my presence by the said John Kampmeyer, this 12th day of May, 1932.

T. P. CLEARY
Notary Public for Woodbury County, Iowa.

(SEAL)

PLAINTIFF'S EX. 28
6/16/54 MJD

(Ex. 28 is a Certificate of Shorthand Reporter, E. W. West, stating that the foregoing transcript is a true transcript of excerpts of the testimony of the plaintiff, John Kampmeyer, etc., etc.)

(Page 2 is merely the introductory page of the partial transcript of testimony of John Kampmeyer, showing the title, date of trial, Appearances, filing date of notes, etc. The following page begins the testimony of John Kampmeyer, which we reproduce as follows:)

JOHN KAMPMEYER . . . the plaintiff in this case, called as a witness in his own behalf and being first duly sworn by the Court, on oath testified as follows:

(during) *Direct Examination*

By Mr. Cleary:

Q. Did Mrs. Kampmeyer ever loan you any money?

A. No, sir; she never had any to loan.

Q. Do you owe Mrs. Kampmeyer any money now?

A. No, sir.

Q. For room rent or board or anything else?

A. No, sir.

Q. Mrs. Kampmeyer says in her petition that you have in your occupation made at least $100 a week. What salary do you make down there?

A. Well, that varies. I haven't drawed a dollar out of my business since long before the first of the year, because I didn't have any money in my business. I have been doing business on borrowed money.

Q. You have been losing money since the first of the year?

A. I have been losing money for the past two years.
Q. How much money have you got on hand in the bank, or any bank?
A. I haven't got any.
Q. How do you do business if you don't have any money?

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A. I am not doing any business.
The Court: What is your business?
A. I am a live stock dealer at the Sioux City Stock Yards.
Q. And that is up and down, sometimes in the spring it is good?
A. Well, the fall is the best season.
Q. The fall is the best season. There isn't any of the commission men making any money now?
A. I think practically all the speculators down there are broke.
Q. She says in her petition here that you are the owner of a couple of houses in Riverside.
A. I don't own no houses in Riverside. There has never been a house in Riverside in my name. . . .
The Court: You have answered the question.
Q. You don't know anything about that?
A. No, sir.
Q. She says you are the owner of certain stock of a value of $3500 in the Sioux City Stock Yards Company. Tell the Court about that stock.
A. I bought 28 shares of stock in the Sioux City Stock Yards Company for $139 a share off the Sioux City Livestock

Bank, or the Stock Yards National Bank, rather, *and I owe* $2,000 on this stock which still is owed on it. Since that time there has been $300 and twice $200 borrowed

against it, making a total of $2700 against this stock.

Q. They have possession of the stock?

A. The bank has, yes. They are holding it for security for the loans.

Q. Did they advance some money to pay for the stock?

A. Yes, sir.

Q. And who has title to this stock, or whose name was it bought in?

A. I put it in the boy's name; that is, I put it "John Kampmeyer, Jr."

Q. And what is this stock worth today?

A. Well, they have changed it now. It is . . . they gave us four for one. That made 108 shares, and I sold six shares for $32 a share, and it is worth what you can get. It is worth from $30 to $35 all depends on what you could get.

I imagine it is selling from $30 to $32.

Q. If it was sold today and the stock paid for, how much equity would be left in dollars and cents, about?

A. I suppose somewhere between $400 and $600.

Q. That is, after paying for the stock you would have that much money left?

A. Yes.

Q. You said something to me about having title to another

piece of property that there is expressly mentioned in her
petition. (J. A. Flemming deal. $300 loan by Kampmeyer)

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(During cross-examination by Mr. Murphy)
Q. Mr. Kampmeyer, if business has been so bad down there how
have you been able to keep on with your living as you are
living, at the Martin Hotel, how are you paying your expen-
ses, where are you getting the money to do that?
A. I mortgaged my car for $300 a few weeks ago.
Q. How long ago?
A. I don't know. Two or three weeks ago.
Q. Is the mortgage on record?
A. Yes, sir.
Q. Who is the mortgage to?
A. Wm. Sparks.
Q. Of this city?
A. Yes, sir; this city.
Q. That was after this action, this Answer and cross-petition.
was filed by Mrs. Kampmeyer?
A. Yes, sir.
Q. What did you do with the $1500 that was in your bank
account at the Live Stock National Bank?
A. I owed my aunt $1400 and I wrote a check out to her.
Q. And that was paid after the attachment was released in re-
gard to that money?
A. Yes, sir.
Q. Isn't that true?
A. Yes, sir; true.

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Q. And you claim to have owed your aunt some money and you

say that was this, it was this money?

A. I borrowed the money from the first of the year because I was broke. My wife knows that well or she wouldn't have settled the way she did.

Q. What is the value of these life insurance policies that you have?

A. I don't know.

Q. Do you have any idea what the cash value of that is today?

A. Well, no, I wouldn't; not exactly.

Q. Have you ever attempted to borrow any money on them?

A. I have in my life.

Q. This house, the Flemming house, is subject to two mortgages?

A. Yes, sir.

Q. What were the amounts of those, do you say?

A. $1500 first mortgage and $3200 something is the second.

Q. You say that you had no interest in the houses out at Riverside?

A. I have no interest in there whatsoever.

Q. Have you any interest in any real estate whatsoever which is out in Riverside?

A. None whatsoever.

Q. Have you ever had any interest?

A. No, sir.

Q. Did you have the title to a house out there placed in the

name of your brother?

A. No, sir; my brother bought that house and paid for it himself.

Q. Did you pay off an $800 mortgage on that house?

A. No, sir; he paid it himself.
Q. Did you ever exercise any possession, or ownership, or claim to share those premises which is this house?
A. No, sir; outside of when he worked for the General Cigar I rented the houses for him and collected the rent.
Q. Did you ever claim to be the owner of the houses?
A. No, sir.
Q. Not at any time?
A. No, sir.
Q. That is the house that your brother owns at the present time?
A. He owns two, or did. He sold one of them on a contract.
Q. But the only claim that you ever had to those was through your renting of those houses?
A. That's all.
Q. And before this you never claimed to be the owner?
A. No, sir.
Q. When have you borrowed the money on this stock which is in the boy's name?
A. When did I borrow it?
Q. Yes.

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A. Well, at different times.
Q. Was the certificate originally issued in the boy's name?
A. Yes, I had it made out in the boy's name to start with, yes.
Q. Did you pay for the stock then at that time?
A. No, the stock never was paid for.
Q. It was never paid for at all?
A. No, sir.

Q. I suppose you were working at the Yards every day until 5:00 or 6:00 o'clock?
A. No, sir; I haven't worked there since January 1st.
Q. What have you been doing?
A. Nothing.
Q. Why wasn't this money down there in your company account at the time it was attached?
A. At that time?
Q. Yes, if you weren't operating.
A. We were operating, but I haven't been working. Probably go and stay until noon and then come up town because I wasn't doing enough business.

Q. How much money have you been making normally per year in your business down at the stock yards?
A. Well, the past two years I have lost between $30,000 and

$40,000.
Q. How much did you make prior to that time?
A. It all depends on the years. Some years I don't make any and other years I made $2,000 or $3,000. Sometimes I made more than that.
Q. What are you living on now?
A. Borrowed money.
Q. Have you been running your business down there?
A. I haven't drawed a dollar out of my business ever since before the 1st of the year. I sold an insurance policy for $700 and something and I have mortgaged my car and

sold my diamond ring.
Q. And you now are entirely out of business?
A. No, I am not entirely out of business. As far as doing any,
yes. I am not doing any business, no.
Q. Are you doing any other thing?
A. No, sir; I am not.

PLAINTIFF'S EXHIBIT 29

APPLICATION TO SET ASIDE JUDGMENT AND DECREE

Comes now the plaintiff and states to the Court:

1. That on or about the 24th day of May, 1932, in the above entitled cause, the court entered a decree in substance as follows:

Granting to the plaintiff herein an absolute divorce and granting to the defendant alimony in the sum of $40.00 per month for her maintenance and the maintenance of the minor child of plaintiff and defendant, John P. Kampmeyer, Jr., and the plaintiff was, in accordance therewith, ordered to make the aforesaid monthly payments, the decree to be in full force and effect until further order of the court.

2. The plaintiff now alleges that due to economic conditions it is necessary that in order to carry on his business that he borrow certain amounts of money and that some of the few assets which he owns at this time is property known as Lot 4, Block 7, Rose Hill Addition to Sioux City, Woodbury County, Iowa.

3. That in order to make a loan upon said premises it is necessary that the decree above stated be set aside and dismissed; otherwise the said decree, remaining a lien upon said premises, it is impossible for plaintiff herein to obtain the loan.

4. That unless the plaintiff is able to borrow certain funds it will be impossible for him to carry on his business

and earn funds sufficient to in any way support the said defendant and the said minor child.

-2-

Wherefore, plaintiff prays that the said decree be set aside and dismissed in so far as the same requires plaintiff to pay said defendant the sum of Forty Dollars ($40.00) per month as support money for herself and minor child, John P. Kampmeyer, Jr., and that it remain in full force and effect as to the custody of said minor child being awarded to the defendant herein, Mary Kampmeyer.

T. P. CLEARY

Attorney for Plaintiff.

State of Iowa, Woodbury County, ss:

I, John Kampmeyer, being first duly sworn on oath state:

That I have read the foregoing application, know the contents thereof and that the statements therein contained are true as I verily believe.

JOHN KAMPMEYER

Subscribed and sworn to before me by the said John Kampmeyer this 15th day of November, A. D. 1932.

T. P. CLEARY

Notary Public in and for Woodbury County, Iowa.

O. K. Weir Murphy

NO. 608 MISC.

FILED
MAR 3 1956
HAROLD B. WILLEY, Clerk

United States Court of Appeals for the Eighth Circuit

No. 15276

Criminal

JOHN P. KAMPMEYER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION
Hon. Wm. F. Riley, District Judge

PETITION FOR REHEARING

BERNARD J. BOYLE,
(Boyle & Hetzner, Omaha, Nebraska),
FRED S. WHITE and
LOUIS E. LIPP,
(White, Lipp & Simon, Omaha, Nebraska),
CHARLES W. BOWERS,
(Des Moines, Iowa),
Attorneys for Appellant.

FILED
DEC -7 1955
E. E. KOCH
CLERK

Law Briefs—OMAHA LINO-SLUG PRINTING CO.—416 So. 15th St.

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United States Court of Appeals for the Eighth Circuit

o———o———o

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, CENTRAL DIVISION
Hon. Wm. F. Riley, District Judge

o———o———o

PETITION FOR REHEARING

o———o———o

The appellant above named petitions this Honorable Court for a rehearing of the appeal in the above entitled cause and in support of this petition, represents to the Court as follows:

Appellant reserves his argued position as to each of the points of appeal, but in this petition addresses himself solely to those features of the decision wherein it is believed that the Court may be convinced its result is based upon the application of incorrect legal principles and the oversight of controlling facts.

Therefore, this petition is directed to the Court's determination of the first, second and fifth points put to it upon appeal in appellant's principal brief. We shall discuss the admissibility of Exhibit 14 and the other challenged exhibits in one division and the issues surrounding the instructions in a second division.

1. As to the admissibility of the Revenue Agents' net worth summary, Exhibit 14, and the other challenged Exhibits.

The keystone of proof by the net worth method is the accuracy of the figures representing the defendant's net worth at the beginning of the indictment period (in this case, January 1, 1947), "as the correctness of the results depends entirely upon the inclusion in this sum of all the assets on hand at the outset".[1] The Government cannot succeed "without proof, that assets on hand *at the beginning of the prosecution period* did not account for the net worth increases".[2]

The Court excuses the admitted failure of the Government Agents to inquire of the appellant as to how much currency he had in his safe and deposit boxes on December 31, 1946 (R. 53), on the ground that he should have volunteered the information. We submit that this overlooks the realities of an Internal Revenue investigation. A taxpayer cannot know, unless told, the purpose and extent of an Internal Revenue inquiry. He can only answer such questions as are propounded to him and assume the Government has all other relevant information it deems necessary for its purposes. It cannot be the taxpayer's burden to pry into the Agent's files to supply

1 **Holland v. U. S.**, 348 U. S. 121, 132.

2 **Smith v. U. S.**, 348 U. S. 147, 155.

deficiencies or correct errors, yet the Court's opinion appears to hold that if a taxpayer is interrogated as to a specific transaction or date, he must tender unrequested answers to unstated questions concerning every other conceivable date and transaction (even years later) at the peril that such information might upon an Agent's subsequent reflection prove material to a civil or criminal action, in which event he will be considered to have remained silent when he should have spoken.

The focus on December 31, 1939, was not a diversionary tactic of the appellant. This date was selected by the Revenue Agents upon their own counsel and determination. Appellant was unaware of what years, if any, were to be involved in a criminal prosecution. In fact, the Agents themselves were neither certain nor in agreement among themselves in this regard, until just before the indictment (R. 8, 46).

Appellant's affidavit, Exhibit 42, was *prepared by the Revenue Agents* after oral interrogations and submitted for appellant's approval and signature. The affidavit contained only such specific items of information as the Agents wanted, although it is conceded that appellant cooperatively responded to all interrogations. That this affidavit contained no declaration with respect to transactions or financial information relating to his net worth on January 1, 1947, resulted simply from the fact that the Agents did not request such information and not because appellant "stood silent." The intent and meaning of the Holland decision is misconstrued if it is cited as authority that the taxpayer must volunteer "leads" willy nilly in the hope that some might be relevant to an inquiry as to whose scope or direction he is completely in the dark. Such a holding would require the defendant to assume the initiative and responsibility for the investi-

gation, since the Agents, by refraining from inquiry, could transfer the burden to the defendant to come forward with evidence and leads at the pain that his failure would be deemed "silence at his peril." How he would divine what information the Agents wanted or what year or years were under review, is not suggested.

The Court has completely overlooked the very "relevant lead" which appellant gave to the Agents concerning his interest in the C. B. Warden Syndicate (R. 6), which on January 1, 1947, was a going enterprise (R. 57). The taxable profits of this partnership amounted to almost $100,000.00 for the calendar year 1946 (Exhibit 12), and required a bank roll for operations of as much as $30,000.00. No inquiry was made by the Agents as to when the 1946 profits were actually distributed (although under Internal Revenue Laws, appellant was required to include in his individual return, which he did, his share of these profits regardless of the time in which they were actually received by him), or how much operating capital the partnership had on hand on January 1, 1947. The Agent admitted that he assumed that appellant had withdrawn his original investment in 1944 (R. 47), and for that reason he did not include appellant's interest in the partnership as of December 31, 1946. The Court has quoted the rule (R. 9) that "it is the Court's function to decide whether evidence is competent to justify certain inferences."[3]

The evidence in this record cannot support the inference that appellant had no further financial interest in the Warden partnership even if he withdrew his original investment in 1944. On the contrary, both the Agents and other Government witnesses testified to appellant's

3 **U. S. v. Valenti**, 134 Fed. 2d 362, 364.

continued membership in the partnership, which produced substantial profits in 1945, 1946 and 1947, as shown by the Government's Exhibits 11, 12 and 13. The only other basis of justifying the omission of appellant's interest in the Warden partnership as of December 31, 1946, would be to find that at 11:59 P. M. on the last day of 1946 the partnership distributed all of its assets, including operating funds and profits, and at 12:01 A. M. on January 1, 1947, the partners reinvested the required operating funds. There is no evidence in the record competent to justify such an inference, and no one has even suggested its possibility.

The other omissions from the Government's net worth tabulation at the beginning of the prosecution period of the undeposited cash from which two cashier's checks aggregating $11,500.00 were acquired in January of 1947, the approximately $30,000.00 in undeposited cash which is reflected in the financial statement given to the bank in August of 1946 when compared with appellant's actual bank balances, and the positive testimony of the President of the bank that the appellant had in the summer of 1945 exchanged large bills of currency for bills of smaller denominations, are condoned in the opinion (R. 16) for the reason: "These, however, all had to do with the situation subsequent to 1940."

It is precisely because they had to do with the situation subsequent to 1940, that they gain in pertinence (and the more recent, the more material), since January 1, 1947, is the pivotal date and not January 1, 1940. We submit that because the Court has overlooked the significant date, its conclusions with respect to the challenged exhibits and instructions, are in error.

The ascertainment of the appellant's wealth at any antecedent time, no matter how precisely determined, is not and cannot be a substitute for the establishment with reasonable accuracy of his net worth at the beginning of the prosecution period. In fact, the statistics of the prior date would be wholly immaterial unless the Government could show that a status of no undeposited currency, having been established as to the earlier date, necessarily, from evidence reasonably justifying the inference, continued to the outset of the indictment years.

Recognizing that all reasonable inferences and intendments from the evidence supporting the verdict must be considered as established facts on appeal, we, nevertheless, urge upon the Court that there have been overlooked certain undisputed testimony which destroys any inference that the claimed no-cash position of January 1, 1940, continued without change to January 1, 1947.

Had the Government taken the view that appellant's tax returns for the seven years prior to 1947 were the limit of his income during that period, then it could have reasonably been inferred that if appellant had no undeposited currency on January 1, 1940, his income was insufficient in the light of his disbursements to accumulate and have on hand undeposited cash on January 1, 1947. But the prosecution has produced evidence and strenuously insists that during the pre-indictment years after January 1, 1940, appellant continuously had substantial funds beyond his reported income. There is nothing in the record upon which an inference can be erected that all such funds were invested in recorded assets within the calendar year received. No such presumption arises at law or in human experience.

The Court has found that the Government sufficiently negated the existence of a cash hoard on December 31, 1939, by showing that the appellant had surrendered or borrowed on his life insurance policies, liquidated his small holding of stock, drew upon his wife's postal savings and bank accounts, made small bank loans, and borrowed more than half of the purchase price of the farm, and otherwise conducted himself inconsistently with the possession of substantial sums of currency. But none of these or similar considerations obtained as of later years. On the contrary, during the pre-indictment years, subsequent to January 1, 1940, according to the Agents' figures, appellant acquired, *without mortgages or sacrifice of savings accounts or securities*, more than $140,000.00 in recorded assets, including several pieces of real estate, bonds, securities, race horses, jewlery and furs—conduct which is in no wise inconsistent with the possession of undeposited cash on January 1, 1947. This is not a matter of credibility or weight of evidence, but we are faced here with a complete absence of evidence competent to predicate an inference of no undeposited cash on January 1, 1947.

By the same token, Exhibit 14 was corrupted by including therein the amount of income reported by appellant from 1940 to 1946, since it is admitted that these figures were not in aid of the net worth computation and had no relationship, statistically, to the negation of undeposited cash or the amount of income that should have been reported in 1947 and 1948. This is not a case like those cited by the Court in which prior year's returns were used for the purpose of negating accumulations during those years which might have been available for investment during the prosecution years.

It may be that the record contains sufficient evidence to justify the inference that appellant did not have $90,000.00 in cash on December 31, 1939. It is also true, however, that the drawing of this inference was not the free and independent act of the jury under proper instructions. The Revenue Agent whom the Court frequently characterized as qualified and expert, was permitted on direct examination to invade the province of the jury and usurp its funcion as to that determination, over the timely objection of the appellant (R. 39). We believe this Court has overlooked the impact and influence of the grossly improper "expert conclusion" of Sklenicka, who was allowed to declare (R. 39) ". . . and I also concluded that the net worth which he shows in his credit statement of June 4, 1940, was all he could have possibly had on that date in the light of the information that I had in regard to his financial history and his tax returns and so forth."

2. As to the giving and refusing of certain instructions.

We submit that the Court has overlooked the imperatives of the Holland decision with respect to the importance of clear anl lucid charges that shall fully acquaint the jury with the nature of a net worth prosecution. The Supreme Court did not treat this matter as one of technical formalities which the trial Court should observe only when precisely directed to do so by the accused. Rather, by emphatic and repeated admonitions, the Supreme Court commanded the trial and appellate Courts to make certain that the "charges should be especially clear, including in addition to the formal instructions, a summary of the nature of the net worth method,

the assumptions on which it rests, and the inferences available both for and against the accused.'"[4]

It appears that this Court has considered our arguments and authorities that the defendant's objections to Instruction 13, particularly in the light of his requested Instruction Number 7, are precise enough to preserve the claimed errors for appeal. This topic was covered in our principal brief and in our reply brief. We do not believe, however, that the Court has weighed the point we advanced that even assuming that appellant's objections were technically insufficient, the nature of the errors was such as to require recognition of them by the Appellate Court, not only under the Holland and companion cases, but under Rule 52-b of the Federal Rules of Criminal Procedure.

Only recently the 9th Circuit reviewed a conviction for tax evasion in *Bloch v. U. S.*, 221 Fed. 2d 786. In that case the Court observed that appellant made no objection to the instructions given by the trial Court and did not raise in the Appellate Court, any question regarding the correctness of the trial Court's charge. Nonetheless, the Circuit Court felt impelled upon its own volition, to consider the error under the mandate of Rule 52-b above. The trial Court in the Bloch case had undertaken to instruct the jury on the issues of willfulness and after appropriate language defining willfulness in general, the Court charged that a person is presumed to intend the natural consequences of his acts and if he intentionally did not set up his income and thereby the Government was cheated of taxes, that he intended to defeat the tax. The Court reversed, saying that the error of the trial Court was so fundamental—going to the very essence of the case, that the reviewing Court must take notice of it.

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4 **Holland v. U. S.**, 348 U. S. 121, 129.

We submit that the instruction which was struck down by the 9th Circuit upon its own notice embraces an error that is no more fundamental or essential than the erroneous instructions complained of in the instant appeal. We submit that the trial Court's declaration to the jury that an excess increase in net worth over a period of nine years (of which only two are charged in the indictment), signifies that there must be a discrepancy in tax payments, is so manifestly erroneous, so completely at variance with the applicable law, as to deprive the appellant of his fundamental and essential rights. In the same degree, that portion of the charge which attempts to validate the conclusions of Exhibit 14, if the jury shall find that appellant did not have $90,000.00 in currency on January 1, 1940, removed from the consideration of the jury, all of the testimony, even that provided by the Government which tended to show that Exhibit 14 did not include all of appellant's assets at the beginning of the prosecution years. It is difficult to conceive an error that relates more to the essence of a net worth prosecution than that comprehended by this erroneous instruction.

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CONCLUSION

It is difficult for an advocate to maintain an objective perspective of his client's cause. Yet, we believe that the issues raised by this petition can only be resolved favorably to the appellant under the principles of Law which make up our very heritage of American liberty and justice. The business of gambling is of base estate in 47 of our 48 states, but men accused of more heinous activities have been accorded the full measure of the Law's protection when they stand before the bar of justice. We trust that this Court upon further consid-

eration, will grant a rehearing, so that the appellant may be fairly tried for the offenses charged.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

We hereby certify in compliance with Rule 15-b of this Court that this petition is filed in good faith and is believed to be meritorious.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 608 Misc.

JOHN P. KAMPMEYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE A PETITION FOR A COMMON LAW WRIT OF CERTIORARI AND PETITION FOR A COMMON LAW WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE MOTION

1. Petitioner's conviction on two counts of income tax evasion under Section 145 (b) of the Internal Revenue Code of 1939 was affirmed by the Court of Appeals on November 22, 1955. On December 19, 1955, that court denied a petition for rehearing. A petition for a common law writ of certiorari was filed in this Court on March 3, 1956. No application for an order extending the time for filing a petition for certiorari was made.

2. Failure to file a petition for a writ of certiorari under 28 U. S. C. 1254 (1) within the thirty-day time limit prescribed by Rule 22 of this Court's Rules is sought to be justified by petitioner on the ground that the Government has filed liens against his assets, pending disposition of his civil tax liabilities, and that he therefore was unable to obtain the services of a "suitable attorney" until after the expiration of the thirty-day period for filing the petition (Pet. 2, 3).[1] No reason is given for failure to seek leave to proceed *in forma pauperis*, or to apply for an extension of time under Rule 22 (2).[2]

3. Petitioner invokes the jurisdiction of this Court under the "all writs" section of the Judicial Code, 28 U. S. C. 1651 (a). The traditional use of the common law writ of certiorari has been as an auxiliary process to correct diminution of the record (cf. Rule 32), and, in cases of imperative necessity, as a means of correct-

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[1] Petitioner also asserts (Pet. 2, 3) that the sentence was unduly harsh. We are advised by the United States Attorney that on March 5, 1956, the trial judge, on petitioner's motion, reduced the total fine from $14,000 to $10,000 and made the prison sentences concurrent rather than consecutive, and that the fine was paid in full on March 8, 1956.

[2] It may be noted that the attorney who filed the motion and petition in this Court represented petitioner during the Government's investigation and at the trial (R. 3, 25).

ing excesses of jurisdiction and furthering justice in other kindred ways. It may not be used as a substitute for the statutory writ of certiorari to review alleged errors committed in the exercise of a lawful jurisdiction. *United States* v. *Beatty,* 232 U. S. 463, 467–468; *United States* v. *Dickinson,* 213 U. S. 92, 102; *Whitney* v. *Dick,* 202 U. S. 132, 137–141; *In re Chetwood,* 155 U. S. 443, 461–462; *American Construction Co.* v. *Jacksonville Railway,* 148 U. S. 372, 379–380; cf. *United States Alkali Assn.* v. *United States,* 325 U. S. 196, 203; *Ex parte Vallandigham,* 1 Wall. 243, 249–251; *Ex parte Gordon,* 1 Black 503. And see *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States* (Wolfson and Kurland ed., 1951), Section 309, pp. 582–587.

4. Petitioner does not attack the jurisdiction of the courts below, and it is plain that he seeks the common law writ of certiorari under 28 U. S. C. 1651 (a) only as a substitute for the writ of certiorari under 28 U. S. C. 1254 (1), for which he failed to apply within the applicable time.

Accordingly, it is respectfully submitted that the motion for leave to file a petition for a common law writ of certiorari should be denied.[3]

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CHARLES K. RICE,
Acting Assistant Attorney General.
JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

MARCH, 1956.

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[3] If the motion should be granted, the Government respectfully requests an opportunity to file a brief in opposition to the petition.

U. S. GOVERNMENT PRINTING OFFICE: 1956